SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 502

DILLARD MORRISON,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	3
Statement of Facts	4
Reasons for Granting Writ	6
Conclusion	12
APPENDIX—	
Opinion by Sidney Sugarman, *Chief Judge*	1a
Judgment of United States Court of Appeals	7a

TABLE OF AUTHORITIES

Cases:

Henry v. Mississippi, 378 U. S. 443, 13 L. Ed. 408 11

Jones v. Huff, 152 F. 2d 14 (U. S. Court of Appeals, D. C. 1945) 9, 10

Maselli v. Renicke, 261 F. Supp. 457 9

Morrison v. U. S., 348 F. 2d 1003; certiorari denied, 382 U. S. 905 ..... 4, 7, 8

U. S. v. Dunhart, 269 Fed. 2d 113 (2nd Cir. 1959) 8

U. S. v. Garguilo, 324 F. 2d 795 (2d Cir. 1963) 8

PAGE

U. S. v. Hayman, 72 S. Ct. 263, 342 U. S. 205 6
United States v. Kahaner, 317 F. 2d 459, 477 (2 Cir.), cert. denied, 375 U. S. 835, 836 (1963) 8
U. S. v. Renicke, decided August 23, 1967—383 F. 2d 129 ..... 9, 11
United States ex rel. Weber v. Regan, 176 F. 2d 579 (7th Cir.), cert. denied, 338 U. S. 809 9

Other Authorities:

Rules of Circuit Court of Appeals:

Rule 22(3) 2
Rule 19 1(b) 2

Title 28, Section 2255 ..... 3, 6
28 U. S. C., Sec. 1254(1) 2

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DILLARD MORRISON,

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—VS.—

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Dillard Morrison, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 11, 1968.

Opinion Below

The opinion of the United States District Court for the Southern District of New York was entered on November 17, 1967. The opinion is not reported and is appended hereto, *infra,* at page 1a. The judgment of the United States Court of Appeals for the 2d Circuit affirming the judgment below has not yet been published and is appended hereto, *infra,* at page 7a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 26, 1965, page 7a, *infra*. The jurisdiction of this Court if invoked under 28 U. S. C., Sec 1254(1) and Rule 22(3) of this court and Rule 19 1(b).

Questions Presented

1. Is a defendant entitled to a hearing on the grounds that he did not have effective assistance of counsel where his grounds include matters within and without the records and files: and consist of acts complained of prior to trial, during trial, and subsequent to trial with enumerated acts being solicitation, false promises in order to gain employment, calling of a known hostile witness as a defense witness, extensive direct examination of defendant as to his prior criminal record while urging a defense of entrapment, failing to follow the rules of procedure for submission of request for charges on the defense of entrapment, failing to assist a trial judge in formulating a known favorable charge on the defense of entrapment, manifesting a lack of devotion and interest in defendant's case?

2. Would errors of trial counsel other than blatant errors constitute grounds of ineffective assistance of counsel?

3. Is the standard for determining lack of effective assistance of counsel limited, in application, to conduct and circumstances of a kind to shock the conscience of the court and make the proceed a farce and mockery of justice?

Statutes and Rules Involved

Title 28, Section 2255

2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the sentenced prisoner.

Statement of Facts

Prior to initiating the proceeding now before this court for review, petitioner has enjoyed the right of appellate review of his conviction on procedural and substantive grounds other than those now before this court for review.

The questions presented for prior appellate review related to the defense of entrapment, failure of Trial Court give a charge even though not specifically requested and cautionary instructions. The litigation terminated adverse to petitioner, 348 F. 2d 1003; certiorari denied, 382 U. S. 905.

1. That said counsel established the relationship of attorney and client while petitioner was being represented by another attorney of the bar by soliciting petitioner through divers persons and by making visits to petitioner while he was represented by another; and in making statements to petitioner that he could get him out and that he was going to beat the case (pages 2 and 3, paragraph 5 of petitioner's motion as filed in the District Court).

2. The calling of government's informer as a witness under circumstances where the said counsel knew that said witness would be a hostile witness (page 4 of motion, paragraph 6(A)).

3. The calling of petitioner as a witness and questioning him on direct examination as to his prior criminal record and conduct (page 6, paragraph 7 of motion).

4. The negligence of trial counsel in not following the procedure of the trial court for timely submission of charges to the court, coupled with the failure of trial counsel to submit a charge to the court on the defense of entrapment under circumstances where trial counsel had in mind the "police conduct rule" as a defense (paragraph 7(A) (B) page 7 of motion).

5. A statement at the sentencing hearing made by trial counsel, "That is right, and I can't say, your Honor, to treat him mildly or lightly or to have sympathy for him because we know what the problems are and we know what we have to do with these people." (paragraph 10 page 10 of motion).

6. Trial counsel subsequent to the conclusion of the trial admitted negligence, misgivings and a series of errors committed during the trial, inclusive of not providing petitioner with a perfect appellant record. (As to the admission of not providing petitioner with a perfect protected appellate record, the same appears as is alleged in paragraph 9 of page 10 of the motion as originally filed. The communication stating the series of errors, mishaps, and "goofing" appears on page 4 of Exhibit B, attached to the original motion as filed.)

7. That petitioner on November 16, 1965 sought by *pro se* motion a reduction of his sentence and stated in said motion that his trial counsel did not have his interest at heart; that he did not have a chance on the basis of the defense presented for him; and that he had paid his trial counsel, but his trial counsel did him a grave injustice. That said counsel, without authority from him, caused his said *pro se* motion to be withdrawn and substituted his own therefor. (The full content of the allega-

tion of petitioner is found on pages 11, subparagraph B. (1), pages 12 and 13 of motion as originally filed.)

8. That the hearing on September 18, 1967 was without the physical presence of petitioner in court, at the time of said hearing.

9. Respondent in its brief in the Court of Appeals and on page 4 thereof summarizes the grounds herein recited and concluded "Judge Sugarman's denial of the motion without a hearing was based on a ruling that the allegations did not meet the standards for determining incompetence of counsel."

Reasons for Granting Writ

I. The principle question in cases where relief is sought from conviction imposed, on the grounds of ineffective assistance of trial counsel is a determination by the trial court to whom the motion is presented as to whether the records and files conclusively show that the prisoner is entitled to no relief, so as to deny or grant a hearing.

In the case of *U. S.* v. *Hayman*, 72 S. Ct. 263, 342 U. S. 205 this court grant certiorari to review the decision that section 2255 must be considered nullity. The court held at page 219 under the third division of its findings. "The issues raised by respondent's motion were not determined by the 'files and records' in the trial court." In such circumstances, section 2255 requires that the trial court act on the motion as follows: "* * * cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (Emphasis supplied.) In requiring a "hearing," the Section "has obvious reference to the tradition of judicial pro-

ceedings". Respondent, denied an opportunity to be heard, "has lost something indispensable, however convincing the ex parte showing." We conclude that the District Court did not proceed in conformity with Section 2255 when it made findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present.

Errors other than blatant errors were noticed by the trial court in ruling on the motion. The errors so noticed were such errors as noticed by the Court of Appeals, 348 F. 2d 1003. The trial court in ruling on the motion further noticed that it obviously would have been more effective had trial counsel objected to this phase of the trial when it was given rather than at the time of sentencing three weeks later (page 4 of the opinion attached as part of the appendix). Petitioner relies on the failure of his trial counsel to have made timely objections to the charge complained of at the time of sentencing as a means of preserving his right to have the Court of Appeals rule on the charge as given. Because of lack of timely objection said right was lost and possible prejudice with regard to the defense of entrapment was noticed by the Court of Appeals. *Morrison* v. *U. S.*, 348 F. 2d 1003 at page 1005: "As for possible prejudice with regard to the defense of entrapment, we agree that more precise instructions might have been appropriate and that the allusion to the 'innocent person' might better have been avoided. Defendant cannot demand a jury charge perfect in every significant detail, however, unless he is prepared to assist the trial judge in formulating one. In the absence of an objection at trial by defendant, we cannot say that in this case the instructions taken as a whole, were so likely to mislead the jury on the entrapment defense as to constitute blatant error requiring reversal. Compare *United States* v. *Pugliese*.

The instruction complained of by petitioner in his motion was ruled on by the Court of Appeals in *Morrison* v. *U. S., supra* at page 1004. "At the same time, we stated in *United States* v. *Pugliese, supra* at —, that when the tiral judge instructs the jury that the defense of entrapment turns on a finding of "persuasion and representations" by the law enforcement officers, the jury is likely to understand him to mean the exertion of undue and improper pressure by the government. Here the trial judge went further; he spoke of defendant's allegedly having been "unfairly induced or coerced by the conduct of the agents" and of the agents having "forced him or pushed him" to commit the crime. While this charge did not state with absolute clarity that government misconduct is an alternative basis of the entrapment defense, we hold it to have been sufficient in the absence of an objection at trial by defendant. See *United States* v. *Kahaner,* 317 F. 2d 459, 477 (2 Cir.), cert. denied, 375 U. S. 835, 836 (1963)."

The errors herein noted by the Court of Appeals and the District Courts are matters of record. The errors are not merely errors of strategy of which the court referred to over which conscientious attorneys might differ as considered in *U. S.* v. *Garguilo,* 324 F. 2d 795 (2d Cir. 1963 and *U. S.* v. *Dunkart,* 269 Fed. 2d 113 2d Cir. 1959).

When the errors, herein above complained of, are considered in connection with the allegation that trial counsel did not have the interest of petitioner at heart which allegation is amplified by paragraph B, subparagraph 1, pages 11 and 12 of the motion filed in the District Court which is the communication addressed to the court in terms of a *pro se* motion for reduction of sentence advising the court of the trial counsel's lack of interest during trial. If trial counsel in fact had no interest as contended

by petitioner such fact would have been matters outside of the record. Trial counsel having admitted subsequent to trial that in the presentation of petitioner case he committed a series of errors and mishaps amounting to goofing (pages 4 of Exhibit B attached to petitioner's original motion). This matter complained of in the petition would be another matter outside of the record. In *U. S.* v. *Renicke,* decided August 23, 1967—383 F. 2d 129, Head note 5 "If counsel's representation is so horribly inept as to amount to a breach of his legal duty faithfully to represent his client's interest there has been a lack of compliance with the fundamental fairness essential to due process." In *Maselli* v. *Renicke,* 261 F. Supp. 457 it was held that blatant mistakes of counsel taking place in presence of court are not necessary to invoke rule that incompetency of counsel of kind as to shock conscience of court and make proceedings a farce and mockery of justice violates constitutional rights to counsel and determination may turn on facts outside the record.

"The subject of effective assistance of counsel is analyzed in 49 Va. L. Rev. pages 1531 through 1562. At page 536 the subject is treated under the subheading A. Errors of Judgment and Trial Tactics, "Due to the many complexities which confront counsel in any trial proceeding, it is apparent that a standard which must embrace all of the matters requiring exercise of judgment on the part of the lawyer must be flexible. It is not surprising, then, that the courts have been less than explicit in their definitions of effective assistance. An example of such a definition and one which represents the view of almost every court is found in *United States ex rel. Weber* v. *Regan,*" 176 F. 2d 579 (7th Cir.), Cert. denied, 338 U. S. 809.

In *Jones* v. *Huff,* 152 F. 2d 14 (U. S. Court of Appeals, D. C., 1945) the court held at page 15 "The combination

of circumstances, if true, is exceptional. The allegations are improbable but if they be true it seems clear that petitioner did not have a trial as we understand that term." The court in the cited case was considering the allegation of counsel's failure to object, failing to call witness to establish innocence, and failing to present sample of handwriting to the jury.

If blatant mistakes are not necessary to be made in the presence of the court in order to invoke rules that incompetency of counsel is of a kind as to shock conscience of court and to make proceedings a farce and mockery of justice then the necessary corollary would be that blatant mistakes are such that would make the trial a farce and mockery of justice. What is a farce and mockery of justice has not yet been clearly defined. Is one at liberty to assert that farce and mockery of justice exists from the following: (1) Where one has employed counsel, and employed counsel does not perform his contract according to the standards for such a performance. (2) Where employed counsel, while representing defendant after trial, and at sentencing, makes a statement couched in language that society is important over the acts of his client? The further question then arises as to whose interest was being protected during trial. It is recognized a trial counsel owes a duty to court as well as owes a professional duty to his client.

On the issue of the application of farce and mockery as applied to effective assistance of counsel it is noted that as in *Jones* v. *Huff, supra* that matters may arise outside of the record so as to deny a defendant the fundamental fairness of a trial. If trial counsel in fact wishes to serve his own interest rather than the interest of his client the serving of his interest may well be a denial of the fundamental fairness of the trial. Petitioner alleged that trial

counsel had no interest in his case. There existed errors in connection with the trial of the case. Only an investigation would determine whether the interest existed.

On the issue of whether effective assistance of counsel is to be determined on the exclusive showing of the trial being a farce and mockery of justice. The court in *Henry* v. *Mississippi,* 378 U. S. 443, 13 L. Ed. 408, held that an accused will not be deemed bound whenever his attorney's choice of tacties is so erroneous as to amount to ineffective assistance of counsel. Also in *U. S.* v. *Renicke supra* it was held that incompetency need not be of a sort of which the trial court may take cognizance and which it has a duty to correct to permit the Federal Court to grant collateral relief from a state conviction. Further while it is clear that certain acts of incompetency may appear in the presence of and be obvious to the trial court, it is equally clear that many forms of an effective assistance of counsel will not be readily apparent to the trial court.

CONCLUSION

It is clear that petitioner in his trial for which he was convicted did not enjoy an errorless trial. It is equally clear that determination of whether petitioner suffered prejudice was concluded by failure of trial counsel during trial. It is also equally clear that if trial counsel had not committed the errors complained of that the existence or nonexistence of prejudice could or would have been determined by the Appellate Court. The issue of prejudice was important at the trial and was foreclosed by ineptness on the part of trial counsel. Therefore it is concluded, for the reasons above stated, that this petition should be granted and it is respectfully submitted that the same be granted.

Respectfully submitted,

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APPENDIX

Opinion by Sidney Sugarman, *Chief Judge*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 2466

UNITED STATES OF AMERICA,

—against—

DILLARD MORRISON,

Petitioner.

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SIDNEY SUGARMAN, *Chief Judge*

Opinion by Sidney Sugarman, Chief Judge

SUGARMAN, *Ch. J.*

Petitioner was convicted after a trial by jury in this court on November 20, 1964 of two counts of violating the federal narcotics laws. His conviction was affirmed by the Court of Appeals on July 26, 1965 (348 F.2d 1003), and his petition for a writ of certiorari was denied by the Supreme Court on November 8, 1965 (382 U.S. 905).

On November 23, 1965 petitioner submitted by letter addressed to the trial judge a pro se application for reduction of sentence. Said application was permitted to be withdrawn on November 29, 1965. Thereafter, on December 30, 1965 petitioner, by his trial counsel, renewed his application for a reduction of sentence pursuant to F. R. Crim. P. 35. Said application was denied by the trial judge in an order filed on January 6, 1966.

Petitioner now seeks an order under 28 U.S.C. § 2255 vacating his sentence because of alleged ineffective and incompetent representation by counsel at his trial which, it is contended, deprived petitioner of the effective assistance of counsel guaranteed by the Sixth Amendment.

The incidents of trial counsel's conduct which petitioner complains about range in time from the circumstances which caused petitioner to retain his trial counsel before the commencement of the trial, to the circumstances which caused petitioner to withdraw his pro se application for a reduction of sentence in November of 1965.

However, only four of these incidents occurred during the period between the commencement of the trial and the sentencing of petitioner:

1) the calling of the government informer as a defense witness even though trial counsel knew that he would be a hostile witness;

2) the calling of petitioner as a witness and questioning him on direct examination as to his prior criminal record;

3) the alleged failure of trial counsel to elicit a more favorable charge from the court on the defense of entrapment;

4) the alleged derogatory remarks about petitioner made by trial counsel at the time of sentencing.

Section 2255 provides that:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

Proof of inadequacy of counsel has in the Second Circuit been held to a most stringent standard ever since 1949 when Judge Smith stated in *United States* v. *Wright*, 176 F.2d 376, *cert. denied*, 338 U.S. 950 (1950):

> "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

That same standard has been reiterated many times since by the Second Circuit, most recently on August 23rd of this year, in *United States ex rel. Maselli* v. *Reincke*, —— F.2d ——.

For the reasons hereinafter stated petitioner does not meet that standard, and his application for a vacatur of his sentence is denied.

The decisions to call the government informer as a defense witness and to have petitioner take the stand in his own behalf and the nature of the direct examination pursued with each of these witnesses were part of trial counsel's tactics which may not have turned out as well as expected. But such miscalculations do not, of themselves, give rise to incompetent representation.

> "It thus seems clear that [defendant] is merely complaining of alleged tactical errors or mistakes in strategy, and for these we can grant no relief. United States v. Duhart, 269 F.2d 113 (2d Cir. 1959). Even assuming counsel to have erred in the respects alleged, the petition was properly denied. When reviewing cases charging incompetence of counsel, we are seeking to vindicate the most fundamental of rights. We are not conducting a seminar in trial procedures, at least where the tactics involved are those over which conscientious attorneys might differ. If [defendant] were to be afforded a hearing on the allegations presented here, our trial and appellate dockets would be swollen with incompetence of counsel cases. A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence. A long stretch in prison, furthermore, affords ample opportunity to reflect with twenty-twenty hindsight upon the tactical errors of one's attorney, and to point to those instances where a Clarence Darrow or even the defendant without counsel might have handled things a shade differently." *United States* v. *Garguilo,* 324 F.2d 795, 797 (2d Cir. 1963).

The question of petitioner's being asked on direct examination about his prior criminal record was considered

by the Court of Appeals on the direct appeal from the conviction (handled by an attorney other than the trial counsel). The court held that the trial court's instructions adequately delimited the probative significance of petitioner's prior criminal record, and that he was not prejudiced by its introduction. 348 F.2d at 1005.

Even though trial counsel did not make a timely objection thereto, the Court of Appeals also considered the contention that the trial court's charge on the issue of entrapment was improper. But the court found no plain error or defect affecting substantial rights under F. R. Crim. P. 52(b) stating at p. 1005:

> ". . . we cannot say that in this case the instructions, taken as a whole, were so likely to mislead the jury on the entrapment defense as to constitute blatant error requiring reversal."

While it obviously would have been more effective had trial counsel objected to this phase of the charge when it was given rather than at the time of sentencing three weeks later, his failure to do so falls far below the level of incompetency required to sustain a successful attack under Section 2255.

At the sentencing hearing trial counsel moved to set aside the verdict on the grounds that petitioner "was denied a fair trial on the issues raised by the defense of entrapment because the Court's instructions to the jury on entrapment were erroneous and defective . . ." The court ruled:

> "Now you are talking about error in the charge. The record is clear on that. Whether I am right or wrong, I passed on it, and it now will be up to the Court of Appeals if it is so advised to determine whether I am right or wrong."

Trial counsel's failure to object did not prejudice petitioner in any way. The Court of Appeals considered the very question which trial counsel failed to object to for the purpose of ascertaining if it contained the "plain error" referred to in F. R. Crim. P. 52(b). It found the instructions on the defense of entrapment to be adequate if not precise. Petitioner has offered nothing on this application which leads to a different conclusion.

Petitioner also objects to the statement of his trial counsel at the time of sentencing wherein he alluded to prior narcotics convictions (a record of which was then before the court in the pre-sentence report) and stated that defendant was a user of narcotics. This device is used constantly in situations of this kind as an attempt to explain a user's "need" to traffic in narcotics.

Whether this unique type of plea for leniency has the desired effect only the trial judge can say. He sentenced petitioner to a term of twenty years as a second federal narcotics offender which was twice the statutory minimum and one-half the statutory maximum. The fact that it did not result in a shorter sentence does not constitute incompetency on the part of trial counsel.

Finding no merit in the arguments raised by petitioner in the papers submitted on behalf of his application and in the records of the case including the pertinent portions of the trial and sentencing transcripts, the motion for a vacatur of sentence is denied.

It is so ordered; no further order is necessary.

/s/ SIDNEY SUGARMAN
Chief Judge

Dated: New York, New York
November 17, 1967

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of June, one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

DILLARD MORRISON,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of United States Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

JUDGMENT ENTERED
8/13/68

JOHN J. OLEAR, JR.
Clerk

A true copy.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk